

SERVED: February <sup>26</sup>~~13~~, 1992

NTSB Order No. EA-3496

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 29th day of January, 1992

BARRY LAMBERT HARRIS,  
Acting Administrator,  
Federal Aviation Administration,

Complainant,

v.

JAMES E. HAMILTON,

Respondent.

Docket SE-9472

OPINION AND ORDER

The Administrator has appealed from the oral initial decision issued by Administrative Law Judge William R. Mullins on August 8, 1989, at the conclusion of an evidentiary hearing.<sup>1</sup> By that decision, the law judge affirmed an order of the Administrator suspending respondent's commercial pilot certificate for his alleged violation of section 91.105(d)(1) of the Federal Aviation Regulations ("FAR"), 14 CFR Part 91.<sup>2</sup> The

<sup>1</sup> That portion of the hearing transcript containing the initial decision and order is attached.

<sup>2</sup> FAR section 91.105(d)(1) (currently 91.155(d)(1)) provides:

(footnote continued . . .)

law judge rejected that part of the Administrator's order finding a violation of section 91.9,<sup>3</sup> and reduced the sanction from a 60-day to a 15-day suspension. We grant the Administrator's appeal to the extent that we will reinstate the section 91.9 violation.<sup>4</sup> We affirm a suspension of 15 days.

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(footnote continued . . .)

(d) Except as provided in § 91.157, no person may take off or land an aircraft, or enter the traffic pattern of an airport, under VFR [Visual Flight Rules], within a control zone -

(1) Unless ground visibility at that airport is at least 3 statute miles. . . .

<sup>3</sup> FAR section 91.9 (currently 91.13(a)) provides:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

<sup>4</sup> Respondent also filed an appeal, which the Administrator has moved to dismiss on timeliness grounds. We will grant the motion and will not consider respondent's appeal.

Although respondent timely filed his notice of intent to appeal, the actual appeal was not filed by its due date, September 27, 1989. On October 23, 1989, respondent sought a retroactive extension of time to file, claiming: 1) that a secretary did not keep track of the 50-day time period, in part in the belief that the due date would run from the "filing" of the transcript; and 2) that an extension of time sought by the Administrator for filing his appeal would automatically extend to respondent. Our General Counsel, acting under delegated authority, denied the request.

Absent a showing of good cause, our consistent policy is to dismiss all appeals in which briefs or extension requests are not timely filed. Administrator v. Hooper, NTSB Order EA-2781 (1988). In this case the extension request was more than 3 weeks late, and respondent's explanations do not constitute good cause. Counsel is expected to know and abide by procedural deadlines, and is responsible for the actions of his staff. We also see no reason counsel should assume that an extension for one party applies to others. Not only was it proper for the extension of time to be denied, absent an extension of time, the appeal is late-filed and no additional reasons are presented to justify its acceptance.

The facts are not in dispute. On December 2, 1987, respondent was pilot-in-command of N4123E, a Piper Super Cub, on a flight between Holy Cross and McGrath, AK. According to the record, required equipment for this aircraft did not include a radio, but it was so equipped. Unfortunately, the radio was inoperative. Although respondent had had some earlier electrical trouble, he did not attempt to use the radio prior to takeoff to confirm its proper operation.

At the time of departure, the weather in Holy Cross was clear. Respondent was unable to reach McGrath Airport by telephone, however, as long distance circuits were out of order.<sup>5</sup> Because the radio was broken, respondent's attempt to contact McGrath after takeoff was unavailing. While respondent was enroute, the ground visibility at McGrath worsened to less than 3 statute miles. As a result, the airport went to IFR (Instrument Flight Rules), and access was controlled.

When respondent arrived at McGrath Airport, prevailing ground visibility was only 2.5 miles. Respondent admitted that he saw the airport's rotating beacon, but did not believe it meant IFR, in part because he allegedly had considerable (approximately 10-mile) visibility on his flight path to the runway. Respondent made an unauthorized, albeit uneventful, landing. However, another aircraft had just departed, and one was awaiting clearance for departure.

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<sup>5</sup> Even if he had called at that time, respondent would have been told that ground visibility exceeded 3 statute miles, thus allowing VFR landing.

The law judge found that respondent erred in landing when the rotating beacon was on, holding that he should have detoured to another nearby airport, and that respondent therefore violated section 91.105(d)(1). He declined to find a violation of section 91.9, reasoning that respondent was not careless because telephone communication was impossible, and radio communication availability was not required in VFR flight. He reduced the suspension to 15 days "[b]ecause the FAR 91.9 violation is the most serious violation. . .". Tr. at p. 59. We agree with the Administrator that a section 91.9 violation was established.

The regulation prohibiting careless or reckless conduct is designed to promote safety and uniformity in commercial flight and to induce compliance with traffic controls. Haines v. Department of Transportation, 449 F.2d 1073 (D.C. Cir. 1971). There is little question but that respondent's conduct was potentially dangerous; it was snowing and there were other departing aircraft.<sup>6</sup> In Administrator v. Kokkonen, 4 NTSB 881 (1983), we discussed the danger in pilots making individual, subjective visibility determinations.

Furthermore, the situation could have been avoided. Respondent could have ensured a working radio (inasmuch as it was December in Alaska, a working radio would have been prudent to say the least). Or, in view of the general weather conditions, he could have assumed the likely import of the beacon and

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<sup>6</sup> Proof of actual danger is unnecessary. Haines, supra. Respondent acknowledged that it was unsafe to operate in a control zone without a clearance (Tr. at pps. 41-42).

diverted to another airport.<sup>7</sup> The record supports a finding of carelessness.

Turning to the sanction, we find that a 15-day suspension of respondent's commercial pilot's license is appropriate, although we do so for reasons different from that of the law judge. We have reviewed the cases offered by the Administrator in support of a 60-day suspension, and find Kokkonen, supra, and Administrator v. Harris, NTSB Order EA-2252 (1986) -- both of which involved 15-day suspensions -- to be most similar to circumstances here.<sup>8</sup>

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is dismissed;
2. The Administrator's appeal is granted in part;
3. The initial decision, to the extent it found no violation of

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<sup>7</sup> Among other reasons not meriting discussion, respondent suggested that the beacon was on because it was past civil twilight. This, however, is inconsistent with his passenger's statement (Exhibit R-2) that it was not dark and the testimony of an eyewitness to the arrival of the aircraft that the Piper's navigation lights were not on. Respondent could not even state categorically that his navigation lights were on.

<sup>8</sup> Other cases cited in the Administrator's appeal, although imposing longer suspensions than we adopt here, are distinguishable. Administrator v. Lisa, 2 NTSB 2131 (1976), imposed a 120-day suspension due to respondent's prior violation history. In Administrator v. Blackwell, 2 NTSB 360 (1973), respondent made no effort to obtain weather conditions and respondent landed in weather far worse than in the instant case. Administrator v. Niemoth, 2 NTSB 1507 (1975) and Administrator v. Bates, 2 NTSB 2871 (1980) involved intentional disregard of weather information and landing instructions, respectively.

FAR section 91.9, is reversed; and

4. The 15-day suspension of respondent's commercial pilot certificate shall commence 30 days after service of this opinion and order.<sup>9</sup>

KOLSTAD, Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order. COUGHLIN, Vice Chairman, did not concur.

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<sup>9</sup> For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the Federal Aviation Administration pursuant to FAR section 61.19(f).